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Freund Baking Co. and Bakery, Confectionery and Tobacco Workers International Union, Local Union 119, AFL-CIO, CLC. Case 32-RC-4221

October 1, 2001

DECISION AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE AND WALSH

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held March 9, 2000, and the hearing officer's report recommending disposition of it.¹ The election was conducted pursuant to a Supplemental Decision, Order, and Direction of Second Election issued by the Board on November 16, 1999.² The tally of ballots shows 3 for and 30 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings³ and recommendations as further discussed below, and finds that the election must be set aside and a new election held.

We agree with the hearing officer's finding that the employee handbook is objectionable in that it reasonably tended to interfere with employees' free choice. Each employee receives, reviews, and reads a copy of the handbook, and is required to acknowledge (by signing a form) that he or she "has been given a copy of the [handbook] summarizing the Company's policies and procedures and [has] read and understood the contents." The "Security: Confidential Information" section of the handbook states, in pertinent part:

Proprietary information includes all information obtained by the employees during the course of their work. This Manual, for example, contains proprietary information You may not disclose or use proprietary or confidential information except as your job requires. Anyone who violates this guideline will be subject to discipline and possible legal recourse.

Thus, by its terms, the rule prohibits employees from disclosing or using proprietary or confidential information, except as their jobs require. The rule also states that the manual contains proprietary information. Virtually the entire handbook deals with wages, hours, and other terms and conditions of employment. Further, Plant

Manager Serratore testified that the Employer considers numerous terms and conditions of employment to be proprietary or confidential information.

As the hearing officer found, employees could reasonably construe the "Security: Confidential Information" section of the handbook as prohibiting them from discussing their wages and working conditions with a union, as well as with others outside of the company. Further, we find, contrary to the apparent conclusion reached by the hearing officer,⁴ that because the above-quoted section of the handbook specifically refers to confidential and proprietary information, prohibits employees from disclosing or using this information, and states that "[a]nyone" who violates the guideline will be subject to discipline and possible legal recourse, employees could reasonably construe this section of the handbook as precluding them from discussing their wages, hours, and other terms and conditions of employment with other employees, as well as with individuals outside of the company.

Accordingly, we adopt the hearing officer's recommendation that objection 1 should be sustained and the election set aside.⁵

⁴ The hearing officer found that the handbook "may not" be construed by employees as prohibiting them from discussing their benefits with other employees.

⁵ We recognize that the margin of victory in the second election was substantial. However, the objectionable conduct affected all of the employees in the unit because the Employer required each employee to receive and review a handbook. In these circumstances, we find that the Employer's objectionable conduct may have directly accounted for the Petitioner's margin of defeat. In any event, "[t]he Board has consistently held that whether an election should be invalidated based on alleged misconduct 'does not turn on election results but rather upon an analysis of the character and circumstances of the alleged objectionable conduct.'" *May Department Stores Co. v. NLRB*, 707 F.2d 430, 434 (9th Cir. 1983)(citation omitted). Accord: *Westside Hospital*, 218 NLRB 96 (1975).

Our colleague concedes that the "Security: Confidential Information" provision would be unlawful. However, he contends, *inter alia*, that the provision does not warrant setting aside the election because the rule antedated the campaign; there is no evidence that the Employer enforced the rule at any relevant time; and there is no evidence, including Serratore's testimony, that the rule caused employees not to discuss wages or any of the terms or conditions of employment. Our colleague's contentions are misplaced. The maintenance of the rule, not its date of promulgation, enforcement, or the effects it had on employees' specific conduct, is what is significant. Cf. *Farah Manufacturing Co.*, 187 NLRB 601, 602 (1970) (the mere maintenance of an unlawful no-solicitation rule "serves to inhibit the employees' engaging in otherwise protected organizational activity . . ."). And, "specific evidence that the rule was invoked as of any particular date against any particular employee" is not necessary. *Id.* Finally, contrary to our colleague, it is irrelevant that there is no evidence that Serratore communicated to employees his opinion that numerous terms and conditions of employment were proprietary or confidential information. As stated above, virtually the entire handbook deals with wages, hours, and other terms and conditions of employment. Here, we have found that employees *could* reasonably have construed the provision as prohibiting them from discussing terms and conditions of employment with other employees, as well as with a union. Thus, we conclude that the maintenance of the rule could reasonably have affected the election results.

¹ The relevant portions of the hearing officer's report are attached.

² 330 NLRB No. 13.

³ The Employer contends that the hearing officer's findings and conclusions demonstrate bias. On careful examination of the hearing officer's report and the entire record, we are satisfied that the Employer's contention is without merit.

DIRECTION OF THIRD ELECTION

A third election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Third Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Bakery, Confectionery and Tobacco Workers International Union, Local Union 119, AFL-CIO, CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Third Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C., October 1, 2001

John C. Truesdale, Member

Dennis P. Walsh, Member

CHAIRMAN HURTGEN, dissenting.

I agree that the Employer's "Security: Confidential Information" provision in its employee handbook is unlawful on its face. Based on its literal language, an employee could interpret the provision to mean that he/she could not discuss wages and other terms and conditions of employment with a collective-bargaining representative or with other employees. However, I do not find that the maintenance of the rule, without more, warrants setting aside the election.

In my dissent in *Diamond Walnut Growers*, 326 NLRB 28, 32 (1998), I explained that I would not apply a per se rule that any unfair labor practice committed during the critical period requires that an election be rerun. I evaluate each case on its own facts to determine whether the conduct at issue can reasonably be shown to have interfered with laboratory conditions. There is no such showing in this case.¹

Here, the maintenance of the rule is the only unlawful conduct. The rule antedated the Petitioner's organizing campaign, and thus was not discriminatorily motivated. There is no evidence that the rule was used to punish protected activities. In fact, there is no evidence that the Employer enforced the rule at any relevant time. There is also no evidence that the rule caused employees not to discuss, either with the Petitioner's representatives or among themselves, wages or any of the terms and conditions of employment. I recognize that Plant Manager Serratore testified that he considered terms and conditions of employment, contained in the employee handbook, to be confidential. However, there is no evidence that his opinion was communicated to employees. Thus, his testimony only reinforces the point that the rule was unlawful. The testimony does not show that the rule deterred employees from discussing employment-related matters.² Finally, and particularly in view of the very lopsided margin of the Petitioner's defeat—30 to 3, with one challenge—I cannot accept my colleagues' proposition that "the Employer's objectionable conduct may have directly accounted for" that electoral result.

Accordingly, I would not set the election aside on the basis of the maintenance of the handbook provision alone. I would certify the results of the election.

Dated, Washington, D.C., October 1, 2001

Peter J. Hurtgen, Chairman

¹ *Farah Mfg.*, cited by the majority, is an unfair labor practice case and thus does not involve the setting aside of an election.

² The absence of a Serratore communication is relevant to the issue of whether the election process was in fact compromised.

APPENDIX

HEARING OFFICER'S REPORT AND
RECOMMENDATION ON OBJECTIONS

OBJECTION 1

The above named Employer maintained a handbook with rules which interfered with Section 7 rights.

The Petitioner did not call any witnesses in support of its objection. Rather, Petitioner directed the hearing officer's attention to the Employee Handbook,³ a copy of which is attached as Exhibit 1, and took the position that it contained invalid rules that were in place at the time of the election. Petitioner specifically mentioned the Security; Confidential Information Section on pages 31 and 32, the Introduction at the beginning of the handbook, as well as various topics discussed throughout the handbook, such as holidays, vacations, leave, discipline, and drug testing.

The Employer called only one witness, Nathan John Serratore, Jr., who has been the plant manager since the facility opened in early 1996. Serratore's undisputed testimony is as follows: He is involved in all aspects of the facility's operation, including insuring that all new hires receive, review, and read a copy of the Employer Handbook.⁴ Each employee is required to sign an acknowledgement which states in pertinent part:

Employee Name: _____

I acknowledge that I have been given a copy of the Company's Personnel Policy Manual summarizing the Company's policies and procedures and have read and understood the contents.

This acknowledgement is then placed in the employee's personnel file. Serratore does not know what employees do with their handbooks after receiving them. He knows of no employee ever disciplined for violating 1) the security confidential information section or 2) the Discipline and Rules of Conduct under Subsection C-Misconduct, Section 7 on page 18, which states that an employee may be disciplined for disclosing or using confidential or proprietary information without authorization. Serratore also knows of no employee ever disciplined for distributing the manual to person's outside of the company.

On cross-examination Serratore testified that employees have been disciplined up to and including termination for violations of the company rules. In response to very specific questions Serratore also testified that job classifications, wages, vacations, hours of work, profit sharing, health plan contributions, leaves of absence, and over-

time are confidential and proprietary information that employees obtain during the course of their work and are not known generally to the public or the industry. Serratore said an employee who disclosed information contained in their own personnel files to someone outside the company, including a union organizer, would be in violation of the employee handbook. He further stated that if he found out that an employee gave the handbook to a union organizer he would discipline the employee.

Finally, Serratore testified that the company places advertisements for job openings in various local newspapers, listing the classification to be filled, the salary range, and setting forth the general benefits, though no specifics, including the name of the company, are given.

At the hearing the Employer argued that Petitioner attempted to expand its objection to include other areas of the handbook, rather than merely the Security; Confidential Information section, pointing out that the Second Supplemental Decision only refers to that portion of the handbook and nothing more.

I find no merit to this argument. In fact, the Second Supplemental Decision also mentions that the Petitioner provided a copy of the entire handbook in support of its objection. Thus, unlike the decision in *Iowa Lamb Corp.*, 275 NLRB 185 (1985), the handbook in its entirety is not wholly unrelated to the issue set for hearing. Additionally the parties were put on notice at the hearing that the matter could be considered in my recommendation. See also *American Safety Equipment*, 234 NLRB 501 (1978), where the Board held "the Regional Director is not required to, nor can he properly ignore evidence relevant to the conduct of the election ... simply because the Union may not have specifically mentioned such conduct in its objections."

Petitioner argues that the election should be set aside because the Employer maintains a rule in the handbook which prohibits employees from disclosing proprietary or confidential information, including wages and other benefits.

In *Lafayette Park Hotel*, 326 NLRB No. 69 (1998), the Board found lawful the Employer's standard of conduct 17, which prohibited employees from divulging hotel-private information to employees or other individuals or entities that are not authorized to receive that information, but contained no provision concerning disclosure of information about fellow employees. Similarly, the Board held, in *Super K Mart*, 330 NLRB No. 29 (1999), that an Employer's confidentiality provision in its employee handbook did not violate Section 8(a)(1) where the provision stated that "Company business and documents are confidential ... (and) disclosure of such information is prohibited," but did not "by its terms prohibit employees from discussing wages or working conditions."

The language at issue in the Security; Confidential information section herein, contains detailed definitions of

³ A copy of the handbook was placed in evidence as a joint exhibit.

⁴ The handbook has been in effect and unchanged since the plant opened.

what is confidential and proprietary. Thus, proprietary information is all information obtained by employees during the course of their work, and confidential information is that which is not known generally to the public or the industry. This includes, as plant manager Serratore testified, job classifications, wages, vacations, hours of work, profit sharing, health plan contributions, leaves of absence, and overtime topics which are also found in the handbook. While no employee has been disciplined for a violation of the rule, Serratore left no doubt that if he found out that an employee gave the handbook, which contains information about employee benefits, to a union organizer, he would discipline the employee.

Though the Employer's Security; Confidential Information section of the handbook, with its definitions, may not be construed by employees as prohibiting them from discussing their benefits with other employees, the rule can be construed as precluding them from discussing their wages and working conditions with a Union, as well as others outside of the company. Clearly this is how the Employer interprets its own policy.

The Employer argues that the handbook did not reasonably tend to interfere with employees free choice such that the election results should be overturned.

The Board has held that the test of conduct which may interfere with the laboratory conditions for an election is considerably more restrictive than the test of conduct

which amounts to interference, restraint, or coercion. *President Riverboat Casino's of Missouri*, 329 NLRB No. 10 (1999); *Dal-Tex Optical Company*, 137 NLRB 1782. Here every employee is given a copy of the handbook, instructed to read it, and sign a form acknowledging that it has been read and understood. In these circumstances, where the rule can be construed as precluding employees from discussions about wages and working conditions to individuals outside the company, and noting its widespread distribution, I recommend that Objection No. 1 be sustained.

RECOMMENDATION

In conclusion, I recommend that Petitioner's Objection No. 1 be sustained, that the election be set aside, and the proceeding be remanded to the Regional Director for the conduct of a third election.⁵

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⁵ Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party may, within fourteen (14) days from the date of issuance of this report, file with the Board at 1099 14th Street, N.W., Washington, D.C. 20570, eight (8) copies of exceptions thereto, with supporting briefs, if desired. Immediately upon the filing of such exceptions, the party filing shall serve a copy thereof together with a copy and statement of service with the Regional Director. If no exceptions are filed to this report, the Board, upon expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.